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 11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 13 SAN JOSE DIVISION

14 **DONALD EUGENE RANDONICH,**

Petitioner,

15
 16 v.

17 **D.K. SISTO, Warden,**

18 Respondent.
 19

C 07-3730 RMW (PR)

**MOTION TO DISMISS PETITION
 FOR WRIT OF HABEAS CORPUS
 AS UNTIMELY**

20 California state prisoner Donald Eugene Randonich^{1/} (“petitioner”) has filed a petition for
 21 writ of habeas corpus in this Court pursuant to 28 U.S.C. §§ 2241 & 2254(d). Respondent hereby
 22 moves this Court for an order dismissing the petition on the ground that it is untimely. *See* 28
 23 U.S.C. § 2444(d)(1). A motion to dismiss in lieu of an answer on the merits is appropriate where
 24 the petition is procedurally defective. *See White v. Lewis*, 874 F.2d 599, 602 (9th Cir. 1989);
 25 *O’Bremski v. Maass*, 915 F.2d 418, 420 (9th Cir. 1990); Rules Governing 28 U.S.C. § 2254 Cases,
 26

27 1. Petitioner’s surname appears in some documents as “Radonich.” *E.g.*, Exh. A. Petitioner
 28 himself has used both spellings. *See, e.g.*, Exh. E; Petition at 1.

1 Rule 4 and Advisory Committee Notes. Respondent has not noticed this motion for hearing as
 2 petitioner is in custody and not represented by counsel.

3 PROCEDURAL HISTORY

4 On August 20, 1998, a Marin County Superior Court jury convicted petitioner of
 5 possession of ephedrine with intent to manufacture methamphetamine and receiving stolen property.
 6 Exh. A at 1; *see* Cal. Health & Safety Code § 11383(c); Cal. Penal Code § 496. The trial court
 7 found petitioner had one “strike” prior conviction and one prior felony drug conviction. Exh. A at
 8 1; *see* Cal. Health & Safety Code § 11370.2(b); Cal. Penal Code § 1170.12. Petitioner was
 9 sentenced to sixteen years and four months in prison. Exh. A at 1; Petition Exhs. A-B.

10 April 12, 2002, the California Court of Appeal affirmed petitioner’s judgment in an
 11 unpublished decision. Exh. A. The California Supreme Court denied review on June 19, 2002.
 12 Exh. B.

13 On March 5, 2007, petitioner filed a petition for writ of habeas corpus in Marin County
 14 Superior Court. Exh. C. That court denied the petition on April 19, 2007. Exh. C.

15 On May 3, 2007, petitioner filed a petition for writ of habeas corpus in the California
 16 Court of Appeal. Exh. D. That court denied the petition on May 10, 2007. Exh. D.

17 On May 23, 2007, petitioner filed a petition for review of the court of appeal’s denial of
 18 his petition for writ of habeas corpus. Exh. E. The California Supreme Court denied the review
 19 petition on June 27, 2007. Exh. E.

20 On or after July 16, 2007, petitioner constructively filed the instant petition by delivering
 21 to prison authorities for mailing to this Court. *See* Petition at 16. The petition was filed in fact on
 22 July 19, 2007.

23 ARGUMENT

24 The petition was filed beyond the one-year statute of limitations. It must be dismissed.

25 Petitioner’s 28 U.S.C. § 2254 petition is governed by the Antiterrorism and Effective
 26 Death Penalty Act of 1996, which imposes a one-year statute of limitations on the filing of federal
 27 habeas petitions. 28 U.S.C. § 2244(d)(1). Here, the limitations period commenced against petitioner
 28 on September 17, 2002, ninety days after the California Supreme Court denied review, when the

1 time for filing a petition for certiorari expired. The limitations period expired a year later, on
 2 September 17, 2003. *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999); Sup. Ct. R. 13. As
 3 petitioner filed the instant petition in 2007, it is untimely by several years. Although petitioner
 4 commenced collateral review in state court in 2007 by filing a series of habeas petitions, those
 5 filings did not toll the statute of limitations, as the limitations period had already expired years
 6 earlier. *See* 28 U.S.C. § 2244(d)(2); *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003);
 7 Exhs. C-E.

8 Petitioner may rejoin that his claim relies upon a right “newly recognized by the Supreme
 9 Court and made retroactively applicable to cases on collateral review,” 28 U.S.C. § 2244(d)(1)(C),
 10 and thus that the limitations period did not commence against him until much later than 2002.
 11 Specifically, petitioner claims he improperly received an upper/aggravated term on his two
 12 convictions, and cites, inter alia, *Cunningham v. California*, 549 U.S. 270 (2007), *Blakely v.*
 13 *Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Petition at 7-
 14 10.

15 Petitioner cannot invoke section 2244(d)(1)(C). The Supreme Court has not made
 16 *Cunningham* retroactively applicable to cases on collateral review. *See* 28 U.S.C. § 2244(d)(1)(C).
 17 Although the Ninth Circuit in *Butler v. Curry*, ___ F.3d ___, 2008 U.S. App. LEXIS 12324 (9th Cir.
 18 June 9, 2008), recently applied *Cunningham* retroactively, it did so only as far as the 2004 issuance
 19 of *Blakely v. Washington*, 542 U.S. 296. The *Butler* court did not, in other words, find *Cunningham*
 20 retroactive beyond 2004. As indicated, petitioner’s judgment became final in 2002.

21 Petitioner similarly cannot rely on *Blakely v. Washington*, 542 U.S. 296 for a delayed
 22 commencement of the limitations period. *Blakely* does not apply retroactively to cases that became
 23 final its 2004 issuance. *Schardt v. Payne*, 414 F.3d 1025, 1036 (9th Cir. 2005); *see also United*
 24 *States v. Cruz*, 423 F.3d 1119, 1121 (9th Cir. 2005) (holding that *United States v. Booker*, 543 U.S.
 25 220 (2005), does not apply retroactively to cases on collateral review).

26 Last, petitioner cannot rely on *Apprendi v. New Jersey*, 530 U.S. 466, to invoke §
 27 2244(d)(1)(C), for the simple reason that it issued in 2000, *before* petitioner’s conviction became
 28 final. Thus, as to *Apprendi*, even if, arguendo, it could be used to support petitioner’s claim,

1 petitioner allowed the limitations period to lapse before raising claim based on it.

2 In summary, petitioner filed the instant petition several years after the expiration of the
3 statute of limitations. The petition accordingly must be dismissed with prejudice as untimely. *See*
4 28 U.S.C. § 2244(d)(1).

5 **CONCLUSION**

6 Accordingly, for the reasons stated, respondent respectfully requests that the petition for
7 writ of habeas corpus be dismissed with prejudice as untimely.

8 Dated: June 30, 2008

9 Respectfully submitted,

10 EDMUND G. BROWN JR.
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16 /s/ Gregory A. Ott
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Randonich v. Sisto, Warden**

No.: **C 07-3730 RMW (PR)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On June 30, 2008, I served the attached

MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS AS UNTIMELY

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

Donald Eugene Radonich
P-23442
California State Prison-Solano
15 I 1LO
P.O. Box 4000
Vacaville, CA 95696

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 30, 2008, at San Francisco, California.

M. Argarin

Declarant

/s/ M. Argarin

Signature